Filed 12/6/04 In re Aubrey H. CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re AUBREY H., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. AUBREY H., Defendant and Appellant.	A104308 (Contra Costa County Super. Ct. No. J03-01101)

Aubrey H. (appellant) appeals after the juvenile court sustained a second degree robbery allegation in a juvenile wardship petition (Welf. & Inst. Code, § 602)[1] and committed him to the Orin Allen Youth Rehabilitation Facility. On appeal, he contends the juvenile court erred in denying his motion to exclude a videotaped confession because (1) his *Miranda*[2] rights were violated, (2) the confession was not voluntary, and (3) the police entered his home without a warrant and arrested him without probable cause. He also contends the juvenile court erred by denying him credits for time served in juvenile hall and by failing to state the maximum time of commitment. We find that the court

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

erred in failing to exclude the confession because the *Miranda* warnings appellant received were inadequate. However, because we also find that the error was harmless, reversal is not required. Finally, we find that the court erred in failing to state the maximum term of confinement and in denying appellant 68 days of custody credit, which require amendment of the juvenile court's order.

PROCEDURAL BACKGROUND

On June 16, 2003, an original juvenile wardship petition was filed, pursuant to section 602, alleging that appellant had committed felony second degree robbery (Pen. Code, §§ 211/212.5, subd. (c)).

On August 4, 2003, at the conclusion of the jurisdictional hearing, the juvenile court granted appellant's motion to suppress evidence (a plastic gun case), but denied his motion to suppress a videotaped confession. On that same date, the court sustained the allegation in the petition.

On August 18, 2003, at the conclusion of the dispositional hearing, the court committed appellant to the nine-month "regular program" at the Orin Allen Youth Rehabilitation Facility (Boys' Ranch).

Appellant filed a timely notice of appeal on October 16, 2003.

FACTUAL BACKGROUND[3]

Prosecution Case

On June 10, 2003, Kayvahn S. was a sophomore at El Cerrito High School. That day, at about 3:00 p.m., he and his girlfriend, Raquel R., also a sophomore, were on the second floor of the school building, outside of a bathroom, when appellant and another person walked into the bathroom. Kayvahn recognized appellant's face because they had gone to the same middle school and appellant also was a student at El Cerrito High

[3] Testimony related to appellant's arrest and the seizure of a plastic gun case, which was later suppressed, is not included in these facts because that testimony is not necessary to our resolution of the issues raised on appeal.

School. He and appellant made eye contact as appellant walked into the bathroom. Appellant also made eye contact with Raquel, who recognized appellant because they were in an English class together in their freshman year. After about a minute, appellant and the other person walked out of the bathroom. Appellant again made eye contact with Kayvahn before walking out of Kayvahn's sight.

About 30 seconds later, appellant returned alone, wearing a black ski mask and gloves, and holding a black gun. Kayvahn knew it was the same person because of his height and the fact that he was wearing the same clothes, including dark pants and a tan or gray Gap sweatshirt, which, when he returned with the gun, appellant had turned inside out. Raquel knew it was the same person because of his height, his eyes, and the fact that he was wearing a hooded sweater or sweatshirt, which he had turned inside out before returning. Appellant pushed Raquel out of the way, pointed the gun in Kayvahn's face, grabbed his shirt, and said, "give me your wallet" or "give me anything" or "[g]ive me everything." Kayvahn, who thought the gun was a BB gun because of the small barrel, gave appellant his wallet and appellant quickly walked away. The wallet had $6.00 in it. About 30 to 45 minutes later, a friend of Kayvahn's found the wallet and returned it to him. Kayvahn did not immediately call the police or tell his mother or the school what had happened because he was afraid of retaliation.

Kayvahn and Raquel did talk with some friends about the incident later that afternoon. When Kayvahn described the perpetrator as "real big" and also described the clothes he was wearing, a friend suggested it might be Aubrey H. When Raquel heard the name, it "rang a bell" as to who the person with the gun was.

The next day, five people started beating up Kayvahn's best friend and Kayvahn jumped into the fight. Police officers came to the school and, while talking about the fight, Kayvahn told the police about the robbery the previous day and gave them appellant's name as the robber. He was certain it was appellant because he knew his face from middle school and, after the robbery, had looked in his middle school yearbook and "matched up the face with the name." An officer then showed Kayvahn a six-photograph lineup and Kayvahn selected appellant's photograph. At the time he identified

appellant's photograph, Kayvahn was "[v]ery positive" that the person in the photograph was the person who had robbed him. He also noted that appellant had big lips, a distinctive feature.

Both Kayvahn and Raquel positively identified appellant at trial as the robber.

Defense Case

Appellant's mother, Barbara L., and father, Aubrey H., III, testified that appellant did not have a sweatshirt with "Gap" written on it and did not own any sweatshirts.[4] Barbara L. testified that appellant was wearing blue jeans and a shirt on June 10, 2003. She also testified that appellant attended North Campus High School in Pinole for his freshman year of high school and transferred to El Cerrito High School in the fall of 2002, at the beginning of his sophomore year. Prior to high school, appellant attended Portola Middle School.

DISCUSSION

I. *Admissibility of the Videotaped Confession*

Appellant contends the juvenile court erred in denying his motion to exclude the videotaped confession because (1) his *Miranda* rights were violated, (2) the confession was not voluntary, and (3) the police entered his home without a warrant and arrested him without probable cause. We conclude that the confession should have been excluded because the *Miranda* warning given to appellant was inadequate in that it failed to adequately advise him of his right to have an attorney, appointed if necessary, present before and during questioning.[5]

A. *Standard of Review*

"The [juvenile] court's determination that the *Miranda* waiver was valid raises a predominantly legal question subject to independent review on appeal." (*People v.*

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[4] Detective Garman, who arrested appellant, testified that, before she took appellant from his home, his mother brought him clothing, including a zippered hooded sweatshirt, which he is shown wearing in the videotape of his interview.

[5] In light of this conclusion, we need not address the remaining contentions related to the admissibility of the confession.

Mayfield (1993) 5 Cal.4th 142, 172.) We independently determine from the undisputed facts as well as those facts properly found by the trial court whether the confession was elicited in violation of *Miranda*. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) In making this determination, we apply federal standards. (*Ibid*.)

B. *Adequacy of the Miranda Warning*

1. *Background*

Detective Garman and Officer Perdee arrested appellant at his home at approximately 10:00 a.m. on June 12, 2003. At about 11:00 a.m., the two officers interviewed appellant, videotaping the conversation. Following some initial small talk, during which appellant said he had not been "read his rights" during any previous encounters with police, Detective Garman and appellant had the following exchange:

"DETECTIVE GARMAN: Well, this is what's happening, is basically you've been accused of doing stuff at the high school, okay? So

"[APPELLANT]: (inaudible)

"Q. Well, I understand that. Well, this is what's happening. . . . So, however, I want to get your side of it, because I'm guessing that your side is completely different, okay? . . . .

"Now, with the rights, legally that means that I have to make sure that you know that you don't have to talk to me. I can't get a stick and start beating you like your parents will, 'Tell me what happened.' That's not what happens, okay? So basically I just want to talk to you, hear your side of the story, and that's voluntarily. We're not going to—you know, old movies and dungeons tied up with chains (inaudible). Wait 'til you sit there and breath [*sic*].

"A. I don't have a problem talking to you.

"Q. Okay. I just want to make sure you understand this is voluntary, and if they didn't read you your rights before, that means *you can have a lawyer and if you don't have a lawyer, you know if this ever goes to court, whatever, the state can actually give you a lawyer, okay?* And then anything you say to me also is not private. I'm not like

your priest or something. It's not a secret. Okay? So anything you say here, you know, I'm just going to say exactly what you said. Okay?

"So you're cool with talking to me?

"A. Uh-huh.

"Q. Okay. You're not doing it against your will; you understand you don't have to talk to me. . . ." (Italics added.)

During the course of the videotaped interview, appellant admitted to having committed the robbery.

Defense counsel moved to exclude the videotaped confession on the ground, inter alia, that the *Miranda* advisement was incomplete because Detective Garman did not advise appellant that he had a right to an appointed attorney, that he had a right to an attorney before questioning, and that anything he said could be used against him in court. The juvenile court found that the *Miranda* admonitions were sufficient and denied the request to exclude the videotaped confession on that ground.

2. *Analysis*

In *Duckworth v. Eagan* (1989) 492 U.S. 195, 201-203 (*Duckworth*), the United States Supreme Court explained that, in *Miranda v. Arizona*, *supra*, 384 U.S. 436, " the Court established certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation. In now-familiar words, the Court said that the suspect must be told that 'he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.' [Citation.] . . . .

"We have never insisted that *Miranda* warnings be given in the exact form described in that decision. In *Miranda* itself, the Court said that '[t]he warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant.' [Citations.] . . .[¶] . . . The inquiry is simply whether the warnings reasonably

'conve[y] to [a suspect] his rights as required by *Miranda*.' [Citation.]" (*Duckworth, supra,* 492 U.S. at pp. 201-203, fn. omitted, italics added by the Supreme Court.)

Here, appellant argues that the warnings did not convey to him his right to the presence of an attorney, appointed if necessary, prior to or during any questioning. We agree.

In *California v. Prysock* (1981) 453 U.S. 355 (*Prysock*), the defendant had been advised that he had " 'the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning,' " and that " 'you have the right to have a lawyer appointed to represent you at no cost to yourself.' " His mother, who was also present, was assured that the defendant "would have an attorney when he went to court," and that " 'he could have one at this time if he wished one.' " (*Id*. at pp. 356-357.)

The United States Supreme Court observed in *Prysock, supra,* 453 U.S. 355, that "[o]ther courts considering the precise question presented by this case—whether a criminal defendant was adequately informed of his right to the presence of appointed counsel prior to and during interrogation—have not required a verbatim recital of the words of the *Miranda* opinion but rather have examined the warnings given to determine if the reference to the right to appointed counsel was linked with some future point in time after the police interrogation. In *United States v. Garcia*, 431 F.2d 134 (CA9 1970) (*per curiam*), for example, the court found inadequate advice to the defendant that she could 'have an attorney appointed to represent you when you first appear before the U.S. Commissioner or the Court.' *People v. Bolinski* [(1968) 260 Cal.App.2d 705] . . . is a case of this type. Two separate sets of warnings were ruled inadequate. In the first, the defendant was advised that '*if he was charged* . . . he would be appointed counsel.' [*Bolinski*, at p.] 718 (emphasis supplied). In the second, the defendant, then in Illinois and about to be moved to California, was advised that ' "the court would appoint [an attorney] *in Riverside County*[, California]." ' [*Bolinski*, at p.] 723 (emphasis supplied). *In both instances the reference to appointed counsel was linked to a future point in time*

after police interrogation, and therefore did not fully advise the suspect of his right to appointed counsel before such interrogation. (Italics added by this court.)

"Here, in contrast nothing in the warnings given [the defendant] suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right 'to a lawyer before you are questioned, . . . while you are being questioned, and all during the questioning.' " (*Prysock*, *supra*, 453 U.S. at pp. 360-361.)

In *Duckworth*, *supra*, 492 U.S. 195, the defendant was advised, inter alia, that " '*[y]ou have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning.* You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court*. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer.' . . . (emphasis added)." (*Id*. at pp. 198-199.)

The United States Supreme Court granted certiorari "to resolve a conflict among the lower courts as to whether informing a suspect that an attorney would be appointed for him 'if and when you go to court' renders *Miranda* warnings inadequate. We agree with the majority of the lower courts that it does not." (*Duckworth*, *supra*, 492 U.S. at pp. 200-201, fn. omitted.) The court found that "inclusion of [the] 'if and when you go to court' language" in the *Miranda* warnings was not improper, first, because it accurately described the procedure for the appointment of counsel in the state in which the crime took place and, second, because "*Miranda* does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one. . . . . If the police cannot provide appointed counsel, *Miranda* requires only that the police not question a suspect unless he waives his right to counsel. [Citation.] Here, [the defendant] did just that." (*Id*. at pp. 203-204.)

The court distinguished the warnings given in *Duckworth* from "the vice referred to in *Prysock*[, which] was that such warnings would not apprise the accused of his right to have an attorney present if he chose to answer questions. The warnings in this case did not suffer from that defect. Of the eight sentences in the initial warnings, one described [the defendant's] right to counsel 'before [the police] ask[ed] [him] questions,' while another stated his right to 'stop answering at any time until [he] talk[ed] to a lawyer.' [Citation.] We hold that the initial warnings given to [the defendant], in their totality, satisfied *Miranda* . . . ." (*Duckworth*, *supra*, 429 U.S. at p. 205.)

In the present case, the warnings given to appellant *did* suffer from the defect of failing to adequately apprise him of his right to have an appointed attorney present if he chose to answer questions. First, it is questionable whether the vague statement to appellant that he could "have a lawyer" and that if he "[didn't] have a lawyer, you know if this ever goes to court, whatever, the state can actually give you a lawyer" adequately apprised him of his right to have a lawyer present before and during questioning.[6]

[6] There is a split of authority among the federal courts as to whether a general warning regarding the right to an attorney, without any indication of when that right attaches, is constitutionally adequate. For example, in *United States v. Noti* (9th Cir. 1984) 731 F.2d 610, 614, the Ninth Circuit Court of Appeals found inadequate a warning that informed the defendant of his "right to the services of an attorney *before* questioning." (Italics added.) On the other hand, the Second Circuit Court of Appeals, for example, held in *United States v. Lamia* (2d Cir. 1970) 429 F.2d 373, 376-377, that, in context, a warning that the defendant had the " 'right to an attorney,' [and] if he was not able to afford an attorney, one would be appointed by the court," given just after he was informed that he did not have to make any statement to officers, effectively "warned [the defendant] that he need not make any statement until he had the advice of an attorney." The Eighth Circuit has ruled inconsistently on this question. (Compare *State of South Dakota v. Long* (8th Cir. 1972) 465 F.2d 65, 70 [warnings inadequate where accused, though advised he had right to an attorney, was not advised that he had right to " 'presence of an attorney and that, if he could not afford one, a lawyer could be appointed to represent him *prior to any questioning*.' "] with *Tasby v. United States* (8th Cir. 1971) 451 F.2d 394, 398 [finding adequate the warning that an attorney would be appointed " 'at the proper time' "].)

Second, and most important, the warning here plainly was not sufficient to inform appellant of his right to the presence of *appointed* counsel before and during any questioning. (See *Prysock*, *supra*, 453 U.S. at p. 360 [reference to appointed counsel was inadequate in cases in which it was "linked to a future point in time after police interrogation, and therefore did not fully advise the suspect of his right to appointed counsel before such interrogation"]; see also *Duckworth*, *supra*, 492 U.S. at pp. 203-205 [where warnings described the defendant's right to counsel " 'before [the police] ask[ed] [him] questions,' " and his right to " 'stop answering at any time until [he] talk[ed] to a lawyer,' " as well as that an attorney would be appointed for him " 'if and when you go to court,' " warnings in their totality satisfied *Miranda*].)

This case is thus distinguishable, not only from *Prysock* and *Duckworth*, but also from *People v. Wader* (1993) 5 Cal.4th 610 (*Wader*), on which the trial court relied in denying appellant's motion to exclude the confession. In *Wader*, a police officer misread a form while reading the defendant his *Miranda* rights and left out the italicized words in the following statement: " 'If you *cannot afford to* hire a lawyer, one will be appointed to represent you before any questioning, free of charge.' " (*Wader*, at p. 637.) The California Supreme Court rejected the defendant's contention that this misreading invalidated the *Miranda* warnings for several reasons. First, 15 to 20 minutes before the misreading of the advisement, the same officer had advised the defendant of his rights under *Miranda* in a manner the defendant did not assert was inaccurate. (*Wader*, at pp. 637-638.) Second, the defendant indicated in writing immediately after the misadvisement that he understood his rights as set forth on an admonition card that correctly stated the warning in question. (*Id*. at p. 638.) Third, the court observed that "the United States Supreme Court has stressed that ' "the 'rigidity' of *Miranda* [does not] exten[d] to the precise formulation of the warnings given a criminal defendant . . . ." ' [Citations.]" (*Wader*, at p. 638, citing *Duckworth, supra,* 492 U.S. at pp. 202-203, quoting *Prysock, supra,* 453 U.S. at p. 359.)

In this case, however, as already explained, the abbreviated warning improperly linked the right to appointed counsel to a future date, and therefore did not satisfy *Miranda*. (See *Prysock*, *supra*, 453 U.S. at p. 360.)

Likewise, the cases cited by respondent in support of its assertion that the warning here was sufficient are not persuasive. (See, e.g., *People v. Mattson* (1990) 50 Cal.3d 826, 858 [defendant adequately apprised of present right to counsel where he "was expressly advised once, and implicitly advised immediately before he waived his rights, that he had a right to have [appointed] counsel present during any interrogation"]; *People v. Thompson* (1990) 50 Cal.3d 134, 165 [warnings, which were virtually identical to those in *Prysock*, were adequate]; *People v. Valdivia* (1986) 180 Cal.App.3d 657, 661, 663-664 [warning that " '[y]ou have the right of attorney, to speak with an attorney and to have him present before any question,' " would not "have caused most people to believe counsel would only be provided before questioning and then whisked away once it began"; no issue raised regarding right to appointed counsel].)

The trial court erred in denying appellant's motion to exclude the videotaped confession on the ground that the *Miranda* warnings did not adequately advise him of his right to the presence of an attorney, including an appointed attorney if he could not afford to pay for one, before and during any questioning.

C. *Prejudice*

Having found that the juvenile court erred in denying appellant's motion to exclude the confession, we must determine whether the error requires reversal.

When a confession obtained in violation of *Miranda* is admitted into evidence, the conviction must be reversed unless we conclude that the error was harmless beyond a reasonable doubt. (See *People v. Neal* (2003) 31 Cal.4th 63, 86, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) Although the erroneous admission of a confession might be harmless in a particular case, it nevertheless is " 'likely to be prejudicial in many cases.' [Citation.]" (*People v. Neal*, at p. 86, quoting *People v. Cahill* (1993) 5 Cal.4th 478, 503.)

In *People v. Cahill*, *supra*, 5 Cal.4th 478, our Supreme Court gave several examples of when an erroneously admitted confession might be harmless, including "(1) when the defendant was apprehended by the police in the course of committing the crime, (2) when there are numerous, disinterested reliable eyewitnesses to the crime whose testimony is confirmed by a wealth of uncontroverted physical evidence, or (3) in a case in which the prosecution introduced, in addition to the confession, a videotape of the commission of the crime [citation]." (*Id*. at p. 505.) These examples, while obviously not exhaustive, reflect the need to demonstrate that the confession was not the centerpiece of the prosecution's case.

In the present case, there was strong eyewitness testimony pointing to appellant as the perpetrator of the robbery. First, Kayvahn and Raquel both recognized appellant, when he made eye contact with them as he went into the bathroom, as a person they had seen before. In addition, they both could discern that the person with the mask and gun was the same person they had seen moments before because his height and clothing were the same, except that his sweatshirt was now inside out. Finally, both witnesses identified appellant in court as the perpetrator. Appellant argues, however, that Kayvahn's and Raquel's identification of appellant as the perpetrator was compromised by the suggestions of classmates that the robber might have been Aubrey H., and was weakened by the testimony of appellant's mother that appellant had not been at El Cerrito High School the year before, which conflicted with Raquel's testimony that she had been in a class with him the prior year.

While the evidence against appellant might not, in the typical case, be sufficient to prove the erroneous admission of the confession harmless beyond a reasonable doubt, this is not a typical case in that it was tried to the court, not a jury. Moreover, when it sustained the petition, the court explicitly "note[d] for the record that even if the evidence of the videotape was not before me, the Court would find there would be sufficient evidence by the identification of the minor that there would be sufficient evidence [*sic*] separate and apart from the videotape to find true all of the elements of the robbery charged in Count One." A court is presumably able to compartmentalize and put aside

tainted evidence if necessary, as the court did here with respect to the gun case it excluded and as it did in finding that, even if it excluded the confession, the evidence was sufficient to sustain the petition.

Given the relatively strong eyewitness evidence; the fact that this was not a jury trial, but instead was a hearing before the juvenile court; and the fact that the court expressly found that the evidence against appellant was sufficient, even without the confession, to find the allegations true beyond a reasonable doubt, we conclude that the error in this case was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. 18, 24.)

II. *Failure to Specify Maximum Period of Confinement*

Appellant contends, and respondent agrees, that the juvenile court erred by not specifying the maximum period of confinement.

The court sentenced appellant to nine months in the "regular program" at the Boys' Ranch. The court did not, however, specify the maximum possible period of confinement, which is defined as the maximum term of imprisonment that could be imposed on an adult convicted of the same crime. (See § 726.) The maximum term of imprisonment for robbery is five years. (Pen. Code, § 213, subd. (a)(2).) Hence, the maximum period for which appellant could have been confined was five years, and the court erred in failing to state this maximum period.

III. *Failure to Give Custody Credit*

Appellant contends, and respondent agrees, that the juvenile court erred when it refused to give him credit for the 68 days he spent in juvenile hall before his commitment at the dispositional hearing.

The period of confinement for a minor may not exceed the maximum term of imprisonment for an adult convicted of the same offense. (§ 726, subd. (c).) Accordingly, a juvenile court must award precommitment custody credit if the minor's total period of confinement would otherwise exceed the statutory maximum term of imprisonment for an adult convicted of the same crime. (*In re Eric J.* (1979) 25 Cal.3d 522, 535-536; *In re Randy J.* (1994) 22 Cal.App.4th 1497, 1503.)

Here, we find that appellant was entitled to 68 days of custody credit toward his maximum period of confinement of five years.

DISPOSITION

The case is remanded to the juvenile court with directions to amend its order to reflect a five-year maximum period of confinement, less 68 days of custody credit. The order is otherwise affirmed.

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Lambden, J.